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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2015-SC-000158-D
(2013-CA-002165)

WANDA JEAN THIELE, ET AL. — APPELLANTS

v.

APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 11-CI-00329

KENTUCKY GROWERS INSURANCE COMPANY — APPELLEE

AMICI CURIAE BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AND INSURANCE INSTITUTE OF KENTUCKY

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was served on this 28th day of April, 2016, by hand-delivering a true copy to Ms. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601; and by mailing a true copy, postage prepaid, to the following persons: Honorable Samuel P. Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable David A. Tapp, Judge, Rockcastle Circuit Court, Rockcastle County Courthouse Annex, 205 East Main Street, Room 102, Mt. Vernon, KY 40456; Honorable Robert R. Baker, Rankin & Baker PLLC, PO Box 225, Stanford, KY 40484; and the Honorable Don A. Pisacano, Miller Griffin & Marks PSC, 271 West Short Street, Suite 600, Lexington, KY 40507-1292.

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INTRODUCTION

This case presents the question of whether this Court should overrule *Niagara Fire Ins. Co. v. Curtsinger*, 361 S.W.2d 762 (Ky. 1962), which defined the term "collapse," as used in a property insurance policy providing coverage for loss caused by "collapse," as "[t]o break down or go to pieces suddenly, especially by falling in of sides; to cave in." *Id.* at 764. In this *amici curiae* brief, the American Insurance Association and Insurance Institute of Kentucky ("Amici") will provide the Court with the broader context surrounding the question presented, including addressing the development of the law nationwide following *Curtsinger*, and the impact that overruling *Curtsinger* would have on insurers and their policyholders.

Since *Curtsinger* was decided more than fifty years ago, the parties to insurance contracts in Kentucky have relied on it. The definition of collapse in *Curtsinger* is fully consistent with the plain meaning of collapse and Kentucky principles of insurance policy interpretation. It also continues to have substantial support in numerous jurisdictions. Principles of *stare decisis* also warrant retaining the rule articulated in *Curtsinger*, and affirming the Court of Appeals.

If this Court decides to overrule *Curtsinger*, such a fundamental change in Kentucky law on the definition of the term "collapse" should be applied prospectively only. Given that the parties to insurance contracts have relied on *Curtsinger* for many years, it would be inappropriate to retroactively overrule this precedent. In other instances in which this Court has overruled prior decisions interpreting insurance policies, it has made its decision applicable only to insurance policies issued or renewed after the effective date of any change in the law. The same rule should be applied here, if *Curtsinger* is overruled.

If this Court decides to overrule *Curtsinger*, it is also critical that any new rule of law be set forth with sufficient clarity and specificity to enable insurers to properly adjust claims and evaluate their potential exposure in pricing their products. Clarity and specificity are also necessary to reduce the number of disputes that reach Kentucky courts, and enable those courts to apply this Court's rule. Amici respectfully urge that, consistent with the most thorough and well-reasoned caselaw applying the "modern" approach nationwide, any new rule should define "collapse," where not defined by the policy, to mean that (1) the building, or portion thereof, must be unfit for its function or unsafe; and (2) a falling down must be imminent, meaning likely to happen without delay.

INTERESTS OF THE *AMICI CURIAE*

The American Insurance Association ("AIA") is a leading national trade association representing property and casualty insurers writing business in Kentucky, nationwide and globally. AIA's members range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts, including this Court. This allows AIA to share its broad national perspective with state and federal courts on matters that shape and develop the law. AIA's interest is in the clear, consistent and reasoned development of law that affects its members and the policyholders they insure.

The Insurance Institute of Kentucky ("IIK") is a non-profit corporation dedicated to educating, supporting and assisting the Kentucky insurance consumer, market and

industry. Its members include national insurers who do business in Kentucky as well as Kentucky-based insurers, national insurance trade associations, and agents, brokers and other insurance related organizations. Its mission includes advocating for issues of importance to its membership, including submitting briefs as *amicus curiae* in cases that impact its membership. The central issue in the case at bar has a direct impact on the membership of the IIK in the day-to-day handling of property insurance claims in Kentucky.

ARGUMENT

I. THIS COURT SHOULD MAINTAIN ITS LONGSTANDING PRECEDENT IN *CURTSINGER*

For decades, insurers issuing property insurance policies have relied on this Court's precedential holding that the "well-understood common meaning" of the word "collapse," as used in a property insurance policy, is "[t]o break down or go to pieces suddenly, especially by falling in of sides; to cave in." *Curtsinger*, 361 S.W.2d at 764. Kentucky principles of insurance policy interpretation warrant reaffirming *Curtsinger*. Under Kentucky law, "[w]hen the terms of an insurance contract are unambiguous and reasonable, they will be enforced," and "the policy must receive a reasonable interpretation consistent with the plain meaning in the contract." *Tower Ins. Co. v. Horn*, 472 S.W.3d 172, 173-74 (Ky. 2015). "[W]here not ambiguous, the ordinary meaning of the words chosen by the insurer is to be followed," and "words which have no technical meaning in law, must be interpreted in light of the usage and understanding of the common man." *State Farm Mut. Auto. Ins. Co. v. Slusher*, 325 S.W.3d 318, 322 (Ky. 2010) (quoting *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 638 (Ky. 2007)). As in 1962, the ordinary person today would interpret the word "collapse" to

mean a sudden falling down or caving in. *Curtsinger*, 361 S.W.2d at 764. The ordinary meaning of "collapse" has not changed, and Kentucky's principles of insurance policy interpretation have not changed. This Court should therefore reaffirm *Curtsinger*.

Stare decisis also warrants that such longstanding precedent remain in place. "Stare decisis requires this Court to follow precedent set by prior cases, and this Court will only depart from such established principles when 'sound reasons to the contrary' exist." *Saleba v. Schrand*, 300 S.W.3d 177, 183 (Ky. 2009). As Kentucky courts have long recognized, the doctrine of *stare decisis* "is entitled to great weight, and is adhered to by most courts, unless the principle established by the prior decisions is clearly erroneous." *Stoll Oil Refining Co. v. State Tax Com.*, 296 S.W. 351, 352 (Ky. 1927) (emphasis added); *Chestnut v. Commonwealth*, 250 S.W.3d 288, 295 (Ky. 2008) ("It is with anything but a cavalier attitude that we broach the subject of changing the ebb and flow of settled law.").

Curtsinger should also be reaffirmed because it has been followed by numerous other jurisdictions over subsequent decades. *See, e.g., Higgins v. Connecticut Fire Ins. Co.*, 430 P.2d 479, 481 (Colo. 1967); *Eaglestein v. Pacific Nat'l Fire Ins. Co.*, 377 S.W.2d 540, 544 (Mo. Ct. App. 1964); *Olmstead v. Lumbermens Mut. Ins. Co.*, 259 N.E.2d 123, 126 (Ohio 1970); *see also State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 326 (Ala. 1999); *Clendenning v. Worcester Ins. Co.*, 700 N.E.2d 846, 848 (Mass. App. Ct. 1998); *Employers Mut. Cas. Co. v. Nelson*, 361 S.W.2d 704, 708 (Tex. 1962); *Gage v. Union Mut. Fire Ins. Co.*, 169 A.2d 29, 30 (Vt. 1961).

Moreover, "[t]he amount of insurance premiums paid by the insured is based on the risk the insurer bears." *State Farm Mut. Auto. Ins. Co. v. Riggs*, 2016 Ky. LEXIS 97,

*24 (Ky. Mar. 17, 2016) (Noble, J., concurring). Parties to insurance contracts expect that such contracts will be applied consistent with the manner in which they have been applied by insurers and courts for many years. And, as this Court has noted, "[i]t is a fact of life and good business practice in the insurance industry that increased coverage requires increased premiums." *Brown v. Ind. Ins. Co.*, 184 S.W.3d 528, 532 (Ky. 2005); *see also Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989) (when courts expand insurers' liabilities, this can leave "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities").

II. IF THIS COURT DECIDES TO OVERRULE *CURTSINGER* AND ALTER KENTUCKY LAW ON COLLAPSE COVERAGE, SUCH A CHANGE SHOULD NOT BE APPLIED RETROACTIVELY

If this Court decides to overrule *Curtsinger*, such a change in Kentucky law should not be applied retroactively. This Court has "generally made decisions prospective only when overruling old precedent upon which the losing party has relied." *Branham v. Stewart*, 307 S.W.3d 94, 102 (Ky. 2010); *see also Oliver v. Schultz*, 885 S.W.2d 699, 702 (Ky. 1994) ("In light of the fact that this opinion constitutes a critical change in the enforcement of restrictive covenants in Kentucky, it will be applied prospectively only."); *Fannin v. Cassell*, 487 S.W.2d 919, 921 (Ky. 1972) (overruling prior decision, but making that ruling prospective only). Insurers issuing property insurance policies in Kentucky have relied upon *Curtsinger*. If a different rule of law had applied in Kentucky, insurers would have had the opportunity (consistent with state law and regulations) to either clarify the policy language or price their products differently.

Given that insurers have relied on a well-established precedent that has been in place for more than five decades, any fundamental change in Kentucky law with respect

to collapse coverage should be applied prospectively only, such that the new rule applies only to insurance policies issued or renewed after the effective date of any change in the law. In *Mutual Life Ins. Co. v. Bryant*, 177 S.W.2d 588 (Ky. 1943), for example, prior law with respect to interpretation of disability insurance policies was overruled, but with a proviso that only "policies issued after this decision becomes final will be controlled by the conclusions expressed herein." *Id.* at 593; *see also Osborne v. Johnson*, 432 S.W.2d 800, 805 (Ky. 1968) (explaining that overruling of prior decisions "will have prospective application only, being applicable only to claims filed after the effective date of this opinion"); *World Fire & Marine Ins. Co. v. Tapp*, 130 S.W.2d 848, 852 (Ky. 1939) ("Policies issued after this decision becomes final will be controlled by the conclusion expressed herein."); *Pohlman v. Owensboro Nat'l Bank*, 447 S.W.2d 859, 862 (Ky. 1969) ("The aspect of reliance on the existing law is an extremely important consideration in determining the retroactive effect of overruling cases."). Making any such change in insurance law applicable only to policies issued after the change takes effect will protect the interests of the parties to those insurance contracts that were issued while *Curtsinger* was the controlling law. It will also enable parties to future insurance contracts to change the terms of their contract (including pricing), if they so choose, and consistent with Kentucky insurance statutes and regulations, to reflect the change in applicable law.

III. IF THIS COURT OVERRULES *CURTSINGER* AND ADOPTS WHAT SOME COURTS HAVE DESCRIBED AS THE "MODERN" DEFINITION OF "COLLAPSE," IT SHOULD FOLLOW THE MORE RECENT CASES HOLDING THAT "COLLAPSE" MEANS THAT A BUILDING IS UNFIT FOR ITS FUNCTION OR UNSAFE, AND THAT A FALLING DOWN IS IMMINENT

What has been described by some courts as the "majority" or "modern" approach to the meaning of "collapse" focuses, in the absence of a definition of the term "collapse"

in the insurance policy,[1] on whether there is a "substantial impairment of the structural integrity of the building or any part of a building." *Rankin v. Generali – U.S. Branch*, 986 S.W.2d 237, 238 (Tenn. Ct. App. 1998). Under this standard, as the Washington Supreme Court recently explained, a "collapse" occurs when there is a "substantial impairment of the structural integrity of a building or part of a building that renders such building or part of a building unfit for its function or unsafe," and, where the policy language so provided, the damage "must be more than mere settling, cracking, shrinkage, bulging, or expansion." *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 352 P.3d 790, 791 (Wash. 2015) (en banc). In other words, there must be "an impairment so severe as to materially impair a building's ability to remain upright . . . ." *Id.* at 794 (emphasis added). Applying this standard, the Ninth Circuit held that it was "simply implausible" that condominium walls had "collapsed" when a 1998 insurance policy was in effect, given that the condominiums were still standing in 2015. *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Ins. Co.*, 2016 U.S. App. LEXIS 2036, *4 (9th Cir. Feb. 3, 2016); *see also Indiana Ins. Co. v. Liaskos*, 697 N.E.2d 398, 405 (Ill. App. Ct. 1998) (finding no collapse where "[t]he evidence did not show that the basement foundation wall had moved and separated from the rest of the foundation, that it was no longer supporting the [insured's] home or that its movement caused [the insured's] home to be uninhabitable") (emphasis added); *Government Employees Ins. Co. v. DeJames*, 261 A.2d 747, 750 (Md. 1970) (finding sufficient evidence to establish collapse where engineer testified that building was unsafe and unfit to be occupied); *Rogers v. Maryland Cas. Co.,* 109 N.W.2d 435, 438 (Iowa 1961) (affirming jury verdict finding collapse

[1] Where the policy at issue specifically defines a term, such as "collapse," that definition controls. *See, e.g., Brown v. Ind. Ins. Co.*, 184 S.W.3d 528, 542 (Ky. 2005).

where "[t]he jury could find [the building's] basic structure was materially impaired and it was dangerous to occupy") (emphasis added).

Other courts adopting the so-called "modern" approach have required that a collapse be either an actual or imminent falling down. A leading case requiring such imminence is *Doheny West Homeowners' Ass'n v. American Guar. & Liab. Ins. Co.*, 70 Cal. Rptr. 2d 260 (Cal. Ct. App. 1997), which explained that requiring that a collapse be either actual or imminent "avoids both the absurdity of requiring an insured to wait for a seriously damaged building to fall and the improper extension of coverage beyond the terms of the policy," and also "avoid[s] converting th[e] insurance policy into a maintenance agreement . . . ." *Id.* at 264.

Doheny West extensively surveyed the case law on collapse under property insurance policies, explaining that those cases referring to a "substantial impairment of structural integrity" are cases that "either implicitly or explicitly require that collapse be imminent and inevitable, or all but inevitable." *Id.* at 264. The court defined "imminent" as "likely to happen without delay; impending, threatening," and noted that cases finding an imminent collapse were ones where there was an "immediate danger," or "imminent danger and a degree of damage that indicates that the building will not stand." *Id.* at 264-65. The court found no such evidence in the case before it because a structural engineer testified that the building was safe, not in danger of falling down, and "despite the damage, the beams and other supports were capable of supporting the building." *Id.* at 266.

The South Carolina Supreme Court reached a similar result, explaining, in answering a certified question from a federal district court, that "We find a requirement

of imminent collapse is the most reasonable construction of the policy clause covering 'risks of direct physical loss involving collapse.' We define imminent collapse to mean collapse is likely to happen without delay. This construction protects the insured without distorting the purpose of the clause to protect against damage from collapse." *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Ins. Co.*, 565 S.E.2d 306, 308 (S.C. 2002) (emphasis added).

The South Carolina Supreme Court further noted that "collapse coverage should not be converted into a maintenance agreement by allowing recovery for damage which, while substantial, does not threaten collapse." *Id.*; *see also Zoo Props., LLP v. Midwest Family Mut. Ins. Co.*, 797 N.W.2d 779, 782 (S.D. 2011) (following *Ocean Winds* and requiring an "imminent collapse," i.e., a collapse that is "likely to happen without delay"); *401 Fourth St., Inc. v. Investors Ins. Group*, 879 A.2d 166, 174 (Pa. 2005) (requiring a "falling down, or imminent falling down of a building or part thereof") (emphasis added); *Fantis Foods v. N. River Ins. Co.*, 753 A.2d 176, 183 (N.J. Super. Ct. App. Div. 2000) (collapse means a "serious impairment of structural integrity that connotes imminent collapse threatening the preservation of the building as a structure or the health and safety of occupants and passers-by") (emphasis added); *Royal Indem. Co. v. Grunberg*, 553 N.Y.S.2d 527, 529 (N.Y. App. Div. 1990) (collapse occurred where "[t]he uncontradicted record evidence is that the house was in imminent danger of caving in") (emphasis added); *Whispering Creek Condo. Owner Ass'n v. Alaska Nat'l Ins. Co.*, 774 P.2d 176, 180 (Alaska 1989) (collapse coverage applied where condominium complex was in a "life-threatening condition and in imminent danger of collapse") (emphasis added); *Auto Owners Ins. Co. v. Allen*, 362 So. 2d 176, 177 (Fla. Dist. Ct. App.

1978) (finding a collapse where "the function of the wall and building (including the function of the superstructure) was impaired and the total building . . . was in imminent danger of falling further") (emphasis added).

Other cases referencing a "substantial impairment of structural integrity" standard are cases "decided on facts that indicate imminent danger and a degree of damage that indicates that the building will not stand." *Doheny West*, 70 Cal. Rptr. 2d at 265 (emphasis added) (citing *Beach v. Middlesex Mut. Assur. Co.*, 532 A.2d 1297, 1300-01 (Conn. 1987)); *see also Thornewell v. Indiana Lumbermens Mut. Ins. Co.*, 147 N.W.2d 317, 320 (Wis. 1967) ("If the condition of the part of the building claimed to be in a state of collapse is such that the basic structure or substantial integrity of the part is materially impaired so that it cannot perform its structural function as a part of the building and is in immediate danger of disintegrating, then it can be said to be in a state of collapse within the meaning of the extended coverage of the policy.") (emphasis added).

In jurisdictions where a state supreme court has adopted a definition of "collapse" focusing on whether there is a "substantial impairment of structural integrity," but where the court has not clearly defined what that means, that can spawn the filing of numerous unmeritorious insurance claims and lawsuits. Insureds will claim that simple cracking or minor movement of a wall or foundation is a collapse. *See, e.g.*, *Queen Anne Park*, 2016 U.S. App. LEXIS 2036, at *4 (claim was that a "collapse" consisting of hidden decay occurred 17 years ago, despite the fact that condominiums are still standing today); *Doheny West*, 70 Cal. Rptr. 2d at 251-62 (claim was that, due to cracking in parking structure, an earthquake of large magnitude could cause a collapse). Vague formulations of the "collapse" definition also fail to take into account that policies, such as the one at

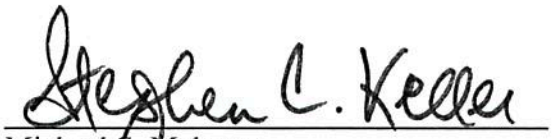
issue here, exclude "loss caused by the settling, cracking, shrinking, bulging, or expanding of a building, or any part thereof . . . ." (Kentucky Growers Policy, at 6.) *See also Queen Anne Park*, 352 P.3d at 791.

To avoid confusion in the lower courts, if this Court overrules *Curtsinger*, it should promulgate a new rule with sufficient clarity and specificity to enable insurers to properly adjust claims and allow insurers and insureds alike to evaluate their potential exposures to new losses. A clear rule, focusing on whether the building is unfit for its function or unsafe, and whether a falling down is imminent, will reduce litigation and allow lawsuits to be more quickly resolved. Any new rule should define "collapse," where not defined by the policy, to mean that (1) the building, or portion thereof, must be unfit for its function or unsafe; and (2) a falling down must be imminent, meaning likely to happen without delay. *See Queen Anne Park*, 352 P.3d at 791; *Doheny West*, 70 Cal. Rptr. 2d at 264; *Ocean Winds*, 565 S.E.2d at 308.

CONCLUSION

Amici respectfully urge that the Court reaffirm *Curtsinger*, and affirm the Court of Appeals. Alternatively, if the Court decides to overrule *Curtsinger*, it should: (1) make any change in Kentucky law applicable only to new or renewal policies issued after the date of the decision; and (2) define "collapse," where not defined by the policy, to mean that: (a) the building, or portion thereof, must be unfit for its function or unsafe; and (b) a falling down must be imminent, meaning likely to happen without delay.

Respectfully Submitted,



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